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In The

# Supreme Court of the United States

October Term, 1996

DAVID CUNNINGHAM,

*Petitioner,*

versus

SCHLUMBERGER WELL SERVICES, A DIVISION OF SCHLUMBERGER TECHNOLOGY CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The U.S. Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARAI

GLENN W. ALEXANDER
*Counsel of Record*
JONES & ALEXANDER
Post Office Box 250
Cameron, Louisiana 70631
Telephone: 318/775-8121

*Attorney for Petitioner, David Cunningham*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED FOR REVIEW

### I.

When a maritime worker is injured offshore while employed and working on a drilling vessel and then files a suit for damages in state court alleging in good faith facts which, if proven at the trial, could *possibly* substantiate his status as a Jones Act seaman, should his employer be able to defeat his choice of forum and the non-removability of his Jones Act suit by claiming in its removal petition that his Jones Act status is fraudulently pled, thereby negating the employee's right to have his suit remanded to state court and his status or lack thereof as a Jones Act seaman determined in the state court?

### II.

Does a maritime worker who spends 75% of his work time aboard drilling vessels and is injured while working aboard one of those vessels have the *possibility* of establishing his status as a Jones Act seaman, and the right to have his suit remanded to the state court forum for a determination of his seaman status or lack thereof?

## LIST OF PARTIES

The following are the parties to this proceeding:

David Cunningham
Plaintiff-Petitioner

Schlumberger Well Services, A Division of
Schlumberger Technology Corporation
Defendant-Respondent

Hardy Oil & Gas (U.S.A.), Inc.
Defendant-Respondent

Diamond Offshore (U.S.A.), Inc.
Defendant-Respondent

Diamond Offshore Drilling Services, Inc.
Defendant-Respondent

Glenn W. Alexander
Jerry G. Jones
Jones & Alexander
Post Office Box 250
Cameron, Louisiana 70631
Attorneys for Plaintiff-Petitioner

David W. Leefe
David Reisman
George Robinson, Jr.
Liskow & Lewis
701 Poydras, Suite 5000
New Orleans, Louisiana 70139-5099
Attorneys for Defendant-Respondent
Schlumberger Well Services, A Division of
Schlumberger Technology Corporation

**LIST OF PARTIES** – Continued

Michael P. Hantel
Schlumberger, Ltd.
Attorney at Law
105 Industrial Blvd.
Sugarland, Texas 77478
Attorney for Defendant-Respondent
Schlumberger Well Services, A Division of
Schlumberger Technology Corporation

Patrick J. Hanna
Rabalais, Hanna & Hebert
201 Energy Parkway, Suite 400
Lafayette, Louisiana 70508
Attorney for Defendants-Respondents
Hardy Oil & Gas (U.S.A.), Inc.,
Diamond Offshore (U.S.A.), Inc. and
Diamond Offshore Drilling Services, Inc.

Robert B. Nolan
Adams & Reese
4500 One Shell Square
New Orleans, Louisiana 70139
Attorney for Defendant-Respondent
Hardy Oil & Gas (U.S.A.), Inc.

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The Memorandum Ruling of the United States District Court for the Western District of Louisiana on Petitioner Cunningham's Motion to Remand is reported at 937 F. Supp. 570 (W.D. La. 1996), and is included in the Appendix.

The Memorandum Ruling of the United States District Court for the Western District of Louisiana on Respondent Schlumberger's Motion for Summary Judgment is not reported, but is included in the Appendix.

The Per Curiam decision of the United States Court of Appeals for the Fifth Circuit under Docket No. 96-31166, Summary Calendar, is not reported, but is included in the Appendix.

The Orders of the District Court issued in connection with its Memorandum Rulings on Petitioner Cunningham's Motion to Remand and Respondent Schlumberger's Motion for Summary Judgment are not reported, but are included in the Appendix.

## STATEMENT OF THE BASIS FOR JURISDICTION

This petition seeks review of the Judgment of the United States Court of Appeals for the Fifth Circuit entered on May 27, 1997, which Judgment affirmed the District Court's denial of Petitioner Cunningham's Motion to Remand this maritime personal injury case to State Court and affirmed the District Court's granting of Respondent Schlumberger's Motion for Summary Judgment.

Jurisdiction of this Court to review the Judgment of the Court of Appeals on a writ of certiorari is based on 28 U.S.C. Section 1254(1).

## STATUTES INVOLVED

46 U.S.C. Section 688. Recovery for injury to or death of seaman (The Jones Act)

(a) Application of railway employee statutes; jurisdiction

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

28 U.S.C. Section 1445. Nonremovable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1-4 and 5-10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60), may not be removed to any district court of the United States.

28 U.S.C. Section 1447. Procedure after removal generally

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

## STATEMENT OF THE CASE

Petitioner, David Cunningham was employed by respondent, Schlumberger Well Services as a well tester on jack-up vessels, barges and semi-submersible drilling vessels. About 75 percent of his work time was spent on such vessels. His job aboard them was to participate in the testing of offshore wells. He had been directly involved in and associated with offshore oil and gas exploration for almost 17 years, and had been employed by Schlumberger Well Services for approximately six years prior to January, 1996.

Mr. Cunningham was sent out on January 15, 1996 to the M/V OCEAN AMBASSADOR, a semi-submersible drilling vessel which was working on an oil and gas well in the Gulf of Mexico off the coast of Cameron Parish, Louisiana. The sole mission and purpose of the vessel

was to drill, test and complete oil and gas wells in deep water. His purpose aboard the vessel was to participate in testing a well.

He had been working on the vessel about six days when the well test began. On January 21, 1996 part of the Schlumberger piping being used in the well test exploded resulting in extreme injury to Mr. Cunningham's left leg and its surgical amputation at the knee shortly thereafter.

David Cunningham filed this suit on May 29, 1996 in the Thirty-Eighth Judicial District Court, Parish of Cameron, State of Louisiana against his employer, Schlumberger Well Services, as well as against defendants-respondents, Hardy Oil & Gas (U.S.A.), Inc., the owner of the mineral lease and the well and Diamond Offshore (U.S.A.), Inc. and Diamond Offshore Drilling Services, Inc., the owner and operator of the OCEAN AMBASSADOR. Also originally named in the suit as defendants were Tony Vovers, Charles M. Adam and Halliburton Company, all of whom were dismissed on unopposed Motions for Summary Judgment; and James E. Guidry who was voluntarily dismissed.

Petitioner alleged as to respondent, Schlumberger that at the time of his catastrophic accident of January 21, 1996 he was a seaman employed by Schlumberger and was a member of the crew of the drill ship OCEAN AMBASSADOR. In his suit he prayed for relief and entitlement to the remedies granted to seamen under the Jones Act, 46 U.S.C. Section 688 et seq., as well as under the provisions of the General Maritime Law.

On July 2, 1996 all defendants filed a Notice of Removal in the United States District Court, Western

District of Louisiana, Lake Charles Division alleging diversity and federal question jurisdiction. They alleged that petitioner's Jones Act claim was fraudulently joined for the purpose of destroying the District Court's removal jurisdiction; and that the allegation of seaman status should be disregarded for purposes of removal.

On July 29, 1996 petitioner filed a Motion to Remand the case to the State Court based on its non-removability as an action under the Jones Act and because he had elected to file the action in State Court. 28 U.S.C. 1445(a). In support of the Motion to Remand petitioner filed an affidavit outlining his employment history, duties and responsibilities and his relationship to the drilling vessel OCEAN AMBASSADOR as well as to other vessels on which he worked, all as set forth hereinabove. In opposition to the Motion to Remand, respondent Schlumberger filed, among other documents, a Declaration of Curtis W. Jones, its district manager of the Houma district and excerpts from petitioner's deposition which the District Court had allowed to be taken prior to its ruling on his Motion to Remand.

In its Memorandum Ruling entered on September 26, 1996 the District Court stated the underlying inquiry as this:

> "Could reasonable persons applying the proper legal standard, decide that plaintiff was a Jones Act seaman?"

The Court then did not inquire into whether or not the Jones Act claim was fraudulently joined for purposes of destroying the District Court's removal jurisdiction, nor did it inquire as to whether the allegation of Jones Act

status was so baseless and plainly false as to constitute a fraudulent attempt to avoid removal to Federal Court.

Instead the Court went straight to the question of determining on its own whether or not petitioner could prove his status as a Jones Act seaman. The Court then concluded that he could not possibly meet the seaman status criteria because he did not have a connection to a vessel in navigation or an identifiable group of vessels that was substantial in terms of both its duration and nature. The Motion to Remand was denied.

On October 4, 1996 Schlumberger filed a Motion for Summary Judgment and Entry of Rule 54(b) Final Judgment on the basis of the Court's previous ruling in connection with the Motion to Remand and petitioner's alleged lack of seaman status. On October 10, 1996 in another Memorandum Ruling the District Court again stated that for the reasons set forth in its Memorandum Ruling of September 26, 1996 petitioner could not possibly satisfy the criteria for seaman status under the Jones Act, and therefore summary judgment would be granted in favor of respondent, Schlumberger. By Judgment also entered on October 10, 1996 the District Court made an express determination that there was no just reason for delay and expressly directed that final judgment pursuant to Federal Rule of Civil Procedure 54(b) be entered in favor of Schlumberger dismissing, with prejudice, petitioner's claims in their entirety against it.

By Notice of Appeal filed November 6, 1996 Cunningham filed his Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. He appealed from the order denying his Motion to Remand this matter to

State Court and from the final judgment pursuant to Federal Rule of Civil Procedure 54(b) entered in favor of Schlumberger.

In a Per Curiam opinion rendered on May 27, 1997 the Fifth Circuit Court of Appeals affirmed the District Court's orders denying petitioner's Motion to Remand and granting the Motion for Summary Judgment in favor of Schlumberger Well Services "for essentially the same reasons set forth by the district court." No other analysis or explanation of the basis for the Court of Appeals' decision was given. Thus without ever having had so much as a hearing in the State Court, his chosen forum, David Cunningham's nonremovable Jones Act case against Schlumberger has been dismissed in its entirety.

Petitioner's claims against Hardy Oil & Gas (U.S.A.), Inc., Diamond Offshore (U.S.A.), Inc. and Diamond Offshore Drilling Services, Inc. are still pending in the U.S. District Court for the Western District of Louisiana, the Court to which they were removed along with his Jones Act claims against Schlumberger.

We ask this Court to grant David Cunningham's Petition for Writ of Certiorari herein, and that thereafter it send this case back to the District Court with instructions that the entire case then be remanded to the State Court where it originated and where it rightfully belongs for determination of his status and his rights and remedies against his employer Schlumberger under the Jones Act, as well as for a resolution of his claims against the remaining defendants.

## ARGUMENT

### I. PETITIONER'S NON-REMOVABLE JONES ACT SEAMAN'S CLAIM WAS NOT FRAUDULENTLY PLEADED AND SHOULD NOT HAVE BEEN REMOVED TO FEDERAL COURT

#### A. The Original Strict Standard of the United States Supreme Court for Removal Since 1918

In *Great Northern Ry. Company v. Alexander,* 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1918) this Court decided that when a nonremovable FELA case is alleged in the State Court pleading, it does not become removable and cannot be made removable by any statement in the defendant's petition for removal or in subsequent pleadings by the defendant. It was also settled then that a case arising under the laws of the United States which was nonremovable on the complaint when commenced, cannot be converted into a removable case by evidence of the defendant or by an order of the court upon any issue tried upon the merits. Rather, such conversion can only be accomplished by the voluntary amendment of his pleadings by the plaintiff or where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by plaintiff of a party or of parties' defendant.

The court summed up the rule of law and procedure as follows at page 239:

> "The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case, arising under a law of

> the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case non-removable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, in invitum, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion."

The factual issue in that case upon which the defendant relied for removal was the question of whether or not the plaintiff's deceased was employed in interstate or intrastate commerce when he was killed. If interstate, the case was nonremovable; if intrastate, it would have been removable. The plaintiff held to his position that it was interstate; the defendant steadfastly maintained that it was intrastate.

The plaintiff prevailed in the state trial court. On review the Supreme Court of Montana held that the deceased was *not* in fact employed in interstate commerce. However because the plaintiff did not at any time admit that he had failed to prove the allegation that the deceased was employed in interstate commerce when injured, and he did not amend his complaint, but on the contrary contended at every stage of the case and in his brief that the allegation was supported by the evidence, this Court determined that the result was that the defendant did not at any time have the right to remove the case to federal court.

Accordingly this Court held that it was without jurisdiction to review the decision of the Supreme Court of Montana and dismissed the defendant's writ of error.

Despite the fact that plaintiff and defendant strongly disagreed over the interstate versus intrastate issue, this was not deemed by the court to amount to a claim that the plaintiff's allegation was incorporated into the complaint fraudulently or in bad faith for the purpose of defeating any right of the defendant to remove the case to the federal court.

This is as it should have been, because the interstate versus intrastate question was clearly a bona fide dispute of both fact and of law between the parties. The defendant could no more claim that the plaintiff's interstate allegations were made fraudulently or in bad faith to defeat removal than the plaintiff could have claimed that the defendant's intrastate allegations in its answer were made fraudulently or in bad faith in order to invoke removal jurisdiction and to defeat the state court's jurisdiction.

### B. The Standard for Removal Broadened and Expanded By the Fifth and Eighth Circuit Courts of Appeal

The U.S. Fifth Circuit Court of Appeals picked up on those procedural principles in *Yawn v. Southern Railway Company*, 591 F.2d 312 (5th Cir. 1979), another FELA case. The plaintiffs filed suit in state court under the FELA, a non-removable action, but the defendant removed to federal court insisting that plaintiff's claims were in reality "minor" disputes arising under the Railway Labor Act, 45

U.S.C. Section 151 et seq. (a removable action) and therefore subject to the Act's grievance and arbitration procedures.

The railroads contended that the employees were attempting to circumvent this mandatory procedure by the artful pleading of an FELA action and that the FELA claims were a mere ruse. Citing the federal non-removal statute 28 U.S.C. 1445(a), the Fifth Circuit had this to say about the defendant's attempt at removal at page 316:

> "Congress has unequivocally declared that in FELA suits filed in state courts, the federal courts are without jurisdiction to proceed in the matter until the cause has run its course at the state level. *Gamble v. Central of Ga. Ry.*, 486 F.2d 781 (5th Cir. 1973). The initial question is whether the prohibition against removal found in section 1445(a) applies when the defendant asserts that the complaint fails to state a cause of action under the FELA. We think that it does. See *Smith v. Camas Prairie Ry.*, 216 F. 799 (D.C.Idaho 1914), cited by this court in *Porter v. St. Louis-San Francisco Ry.*, 354 F.2d 840, 844 (5th Cir. 1966). Consequently, a defendant who asserts that the state court erred in assessing the sufficiency of the FELA complaint cannot, for that reason, remove the suit but must pursue his arguments through state court channels before appealing to the federal courts for relief. However, where the allegations of the complaint are made in a fraudulent attempt to evade removal, the case is removable and should not be remanded to state court. *Great Northern Ry. v. Alexander*, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1918); *Boyle v. Chicago, R. I. & P. Ry.*, 42 F.2d 633, 634 (8th Cir. 1920). ("(T)he federal court has a

> right and a duty to determine the issue of fraudulent statement where such is presented, and, if that statement is properly sustained, the jurisdiction attaches.") The burden of proving that the allegations of the complaint were fraudulently made is on the party seeking to remove the FELA suit, and any doubts should be resolved in favor of the plaintiff. *Boyle*, supra, 42 F.2d at 635; *Farmers Bank & Trust Co. v. Atchison T. & S.F. Ry.*, 25 F.2d 23 (8th Cir. 1928).

It is readily noticeable that although the Fifth Circuit in *Yawn* properly recited the law of this Court as set down in *Great Northern Ry. v. Alexander,* supra, it also adopted and emphasized fraudulent statement language from the Eighth Circuit cases of *Boyle v. Chicago R. I. & P. Ry.*, supra and *Farmers Bank & Trust Company v. Atchison,* supra. Nevertheless the Fifth Circuit went on to hold that the mere assertion of fraud is not sufficient to warrant removing the case to federal court and the railroads had failed to prove that the plaintiffs' allegations of negligence and injury were "so baseless as to constitute a fraudulent attempt to evade removal to federal court."

*B., Inc. v. Miller Brewing Company,* 663 F.2d 545 (5th Cir. 1981) was the Fifth Circuit's next step in expanding on the *Great Northern* principle of this Court. It again set out to review the standards and procedures to be applied where it has been alleged that the plaintiff fraudulently joined a defendant for the sole purpose of defeating the federal court's diversity jurisdiction. This was a contract dispute brought in a Texas state court against a Wisconsin corporation and several Texas resident defendants. Defendant removed alleging fraudulent joinder of the Texas residents, and plaintiff moved to remand.

The trial court held an evidentary hearing on this issue over several days and determined that the Texas defendants had indeed been fraudulently joined for the purpose of defeating the Federal Court's subject matter jurisdiction and went on to enter judgment in favor of the four Texas defendants.

On appeal the Fifth Circuit, citing *Yawn*, supra, recited that where there have been allegations of "fraudulent joinder" the burden is upon the removing party to prove the alleged "fraud." But then it went on to expand the definition of fraudulent joinder at page 549 as follows:

> "The burden of persuasion placed upon those who cry 'fraudulent joinder' is indeed a heavy one. In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts. *Keating v. Shell Chemical Company*, 610 F.2d 328 (5th Cir. 1980); *Tedder v. F.M.C. Corporation, et al.*, 590 F.2d 115 (5th Cir. 1979); *Bobby Jones Garden Apartments v. Suleski*, 391 F.2d 172, 177 (5th Cir. 1968); *Parks v. New York Times Company*, 308 F.2d 474, 478 (5th Cir. 1962), cert. denied, 376 U.S. 949, 84 S.Ct. 964, 11 L.Ed.2d 969 (1964)."

So the removing defendant now had two avenues of approach: (1) it could actually prove outright fraud in the plaintiff's pleadings of jurisdictional facts; or (2) it could show that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state

defendant in state court. In other words, if defendant could not prove fraud, he could still prevail and defeat removal by in effect having a summary judgment hearing in federal court on his removal petition. The mechanics for doing this were provided in *B., Inc.* also at page 549:

> "In support of their removal petition, the defendants may submit affidavits and deposition transcripts; and in support of their motion for remand, the plaintiff may submit affidavits and deposition transcripts along with the factual allegations contained in the verified complaint. The district court must then evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff. *Keating v. Shell Chemical,* supra; *Tedder v. F.M.C.,* supra; *Bobby Jones Garden Apartments v. Suleski; Parks v. New York Times Company,* supra. Moreover, the district court must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff. *Bobby Jones Garden Apartments v. Suleski,* supra; *Dudley v. Community Public Service Company,* 108 F.2d 119 (5th Cir. 1939); *Howard v. General Motors Corporation,* 287 F.Supp. 646 (N.D.Miss. 1968).
>
> "If, having assumed all of the facts set forth by the plaintiff to be true and having resolved all uncertainties as to state substantive law against the defendants, the district court should find that there is no possibility of a valid cause of action being set forth against the in-state defendant(s), only then can it be said that there has been a 'fraudulent joinder'. *Tedder v. F.M.C.,* supra; *Keating v. Shell Chemical,* supra at 332. However, if there is even a possibility that a state court would find a cause of action stated

> against any one of the named in-state defendants on the facts alleged by the plaintiff, then the federal court must find that the in-state defendant(s) have been properly joined, that there is incomplete diversity, and that the case must be remanded to the state courts. *Parks v. New York Times Company,* supra; *Bobby Jones Garden Apartments v. Suleski,* supra; *Keating v. Shell Chemical Company,* supra at 333.

After having established these rules and procedures, the Fifth Circuit went on to analyze the facts in *B., Inc.* and concluded that the in-state defendants were *not* fraudulently joined and therefore ordered the case remanded to the district court with instructions that it then be remanded to the state court in Texas from whence it came.

Twelve years later the Fifth Circuit took the expanded view of removal jurisdiction one step further by extending it to Jones Act claims in *Lackey v. Atlantic Richfield Company,* 990 F.2d 202 (5th Cir. 1993). The Court of Appeals stated at page 207 that:

> "Defendants may pierce the pleadings to show that the Jones Act claim has been fraudulently pleaded to prevent removal. The fact that Jones Act claims are ordinarily not removable does not prevent this inquiry."

The court cited its own *Yawn* and *B., Inc.* standards as well as the Eighth Circuit decisions in *Boyle v. Chicago R. I. & P. Railroad Company,* supra and *Farmers Bank & Trust Company v. Atchison,* supra. It then resolved the dispute in *Lackey* in the plaintiff's favor and ordered the case remanded to the District Court and then in turn "back to state court where it belongs."

### C. It is Time to Return to The Original Strict Standard of the United States Supreme Court for Removal of Jones Act Suits

We believe that in the 79 years since this Court's 1918 pronouncement in *Great Northern Railway v. Alexander,* the Fifth and Eighth Circuits have moved much too far in eroding the rights of railroad workers and seamen claiming status under the FELA and Jones Act to choose the forum in which to litigate their claims for death and personal injury as the Congress originally intended. The non-removal statute 28 U.S.C. 1445(a) is very clear and bears repeating:

> "A civil action in any State Court against a railroad or its receivers or trustees, arising under Sections 1-4 and 5-10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60), may not be removed to any district court of the United States."

By remand of the case to the State Court, the alleged seaman still has to prove to the trier of fact that he is a seaman. If the employer chooses to file a motion for summary judgment on seaman status in the State Court proceeding, the seaman still has to come forward with sufficient evidence to prove to the State Court judge that he can establish seaman status in a trial on the merits.

What the Fifth and Eighth Circuits have done is to allow Jones Act defendants to choose the forum for the plaintiff's suit rather than allowing the plaintiff seaman to choose his forum as Congress had intended. To allow the defendant employer to do this by his allegations of fraud on the plaintiff's part is in fact fraudulent in and of itself. Even though there is a good faith dispute as to

seaman status in this case, the defendant employer under the Fifth Circuit rule is allowed to fraudulently remove the case to Federal Court by alleging that the plaintiff's claims are fraudulent. This maneuver should not be allowed in this case, and this Court should not allow it to continue to occur in other seamen's cases.

We truly believe that David Cunningham has at least the *possibility* of proving his status as a seaman under the Jones Act at the trial of this case. The reasons for this are set forth in detail in the next section of our argument. We urge the Court to grant this Writ of Certiorari, and thereafter to reinstate the original rule of *Great Northern Ry. v. Alexander* and to remand this case to the Court of Appeals and then to the District Court with instructions to remand it to the State Court in Cameron Parish, Louisiana where it began and where it has always belonged.

## II. PETITIONER DAVID CUNNINGHAM HAS AT LEAST THE POSSIBILITY OF PROVING JONES ACT SEAMAN STATUS TO A JURY

In *Chandris, Inc. v. Latsis*, 515 U.S. 374, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995) this Court was asked to clarify "what employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act 46 U.S.C. 688." The Court reviewed the early history of the Jones Act, and restated the often repeated philosophy that seamen are emphatically the wards of the admiralty because they are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting

labor. Traditional seamen's remedies have been universally recognized as growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected. (*Chandris, Inc.*, p. 2183).

The Court, after further extensive review of the history and jurisprudence of the admiralty law and the Jones Act made the following announcement at page 2190 of the opinion:

> "Giving effect to those guiding principles, we think that the essential requirements for seaman status are twofold. First, as we emphasized in *Wilander*, 'an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission.' The Jones Act's protections, like the other admiralty protections for seaman, only extend to those maritime employees who do the ship's work. But this threshold requirement is very broad: 'All who work at sea in the service of a ship' are eligible for seaman status.
>
> "Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."

This Court went on to remind us that the question of seaman status is a mixed question of law and fact citing *McDermott, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 818, 112 L.Ed.2d 866 (1991) as follows at page 2190 of the *Chandris* decision:

> "It is important to recall that the question of who is a 'member of a crew,' and therefore who is a 'seaman' is a mixed question of law and fact. . . . 'if reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew' it is a question for the jury' . . . . The jury should be permitted, when determining whether a maritime employee has the requisite employment-related connection to a vessel in navigation to qualify as a member of the vessel's crew, to consider all relevant circumstances bearing on the two elements outlined above.
>
> * * *
>
> In our view, 'the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendent thereon.' *Wallace v. Oceaneering International*, 727 F.2d 427, 432 (5th Cir. 1984). The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land based employee who happens to be working on the vessel at a given time."

Following the Court's decision in *Chandris*, additional interpretations in cases on seaman status have come from the United States Courts of Appeal for the Ninth and Second Circuits.

In *Boy Scouts of America v. Graham*, 76 F.3d 1045 (9th Cir. 1996), the plaintiff was an adult volunteer on an

outing with the Sea Explorers, a nautical group of Boy Scouts. He was serving as the mate on THE AMBROSE. The other adult volunteer was the skipper of the vessel. The plaintiff was injured when he dove into shallow waters to swim to shore and secure the bow line.

Graham was on a training cruise with the Boy Scouts. There were only two adults on board, and the rest were Boy Scout trainees. There was no question in the case that Graham was a gratuitous worker on a cruise that lasted only ten days and that he was not a professional seaman. He was a volunteer, on a venture which was not commercial but primarily recreational. The Court reversed a summary judgment on seaman status that had been granted in favor of the defendant stating that the purpose of the Jones Act is to protect maritime workers and that there was a genuine issue of material fact as to whether Graham had a connection to the vessel that was substantial in duration and nature.

In *Fisher v. Nichols,* 81 F.3d 319 (2nd Cir. 1996) the Second Circuit considered the situation where the plaintiff was injured during a sailing race while serving as a crew member on a 70-foot oceangoing sail boat owned by the defendant. The plaintiff was paid $250.00 cash plus travel expenses for a one day voyage. The court stated at page 323 of the opinion that although Fisher's time with the vessel was arguably substantial in nature, it was best characterized as insubstantial in duration. The court discussed the substantial connection test pointing out that although the voyage on the OBSESSION was for only one day, Fisher's professional employment was as a paid professional captain and his entire career up to and

including the moment he suffered the injury was dedicated to seabased work. His employment aboard the OBSESSION as a member of its crew was a continuation of his chosen profession.

We must again emphasize to the Court that David Cunningham's employment in this case aboard the OCEAN AMBASSADOR was similarly a continuation of his chosen profession as a well tester on drilling vessels.

The Second Circuit continued its discussion and analysis of the substantial connection test as follows on page 323 of the *Fisher* opinion:

> "We believe that an approach to determining seaman status, which takes into consideration all of one's sea related activities, not just those pertaining to employment with a particular employer, is fully consistent with the Supreme Court's status-based analysis in *Chandris* and is the approach that most comports with the central purpose of the Jones Act – to protect those who are particularly vulnerable to the perils of the sea as a result of their employment and who, by tradition, have been wards of the admiralty law. . . . We therefore adopt such an approach and decline to adhere slavishly to the 'fleet doctrine' found in the case law of some of our sister circuits . . . we do not read *Chandris* as requiring that in order to recover from an employer, a Jones Act plaintiff must necessarily have a substantial connection to a particular vessel owned by that employer or to a group of vessels under ownership or control of that employer.

* * *

> "Fisher's regular employment was sea-based and exposed him on a recurring basis to the perils of the sea. When that fact is coupled with his activity aboard the OBSESSION as a crewman, which contributed to the function of the vessel and the accomplishment of its mission, we believe Fisher is the type of person to whom the Jones Act was designed to give protection."

The Court affirmed the jury verdict which had found for Fisher on his Jones Act claim.

David Cunningham was a well tester employed by Schlumberger with the primary duty of testing offshore gas wells. He was assigned to the offshore division of Schlumberger to test wells aboard numerous semi-submersible drill ships. He was working on a vessel, i.e. the OCEAN AMBASSADOR, a semi-submersible drill ship drilling in the Gulf of Mexico off Cameron Parish at the time of the catastrophic injury which cost him his leg. The sole function of that vessel was to drill, test and to complete oil and gas wells.

Petitioner's work history with Schlumberger indicates that 75 percent of his projects were on semi-submersible rigs, barges or jack-ups, all traditionally recognized as vessels. Clearly he was performing seaman's work at the time of his accident and was contributing to the function of the OCEAN AMBASSADOR.

Jones Act protection is reserved for those who are facing the perils of the sea and the special hazards of the sea. Cummingham faced the same perils of the sea and of the dangerous nature of the work of the vessel the same

as every one else who served aboard it. It was one of those perils of the job that resulted in the loss of his leg.

We do not ask the Court to make a finding that David Cunningham was a seaman and that he enjoyed seaman status under the Jones Act at the time of his accident. We merely ask the Court to afford him the opportunity to pursue his Jones Act claim and to attempt to prove his status as a seaman under the Jones Act to the fact finder in this case.

We strongly believe that it is *possible* that he can prove seaman status to the jury. Seaman status is fact intensive, and it will be up to him to prove the facts necessary to the jury in this case to establish his status as a seaman.

We simply request that he be allowed the chance to attempt his voyage toward the safe harbor of the Jones Act. He may not reach that destination, but at least he should have the chance to try. As long as there is a *possibility* of him reaching his destination, then this Court should at least allow him the opportunity to set sail in that direction.

## III. CONCLUSION

The District Court and Court of Appeals improperly retained jurisdiction over this case because Jones Act claims are nonremovable, and because Jones Act employers should not be able to have such suits removed and decided in Federal Court simply by alleging fraudulent joinder, when in truth there is a mixed question of

law and fact as to whether or not the plaintiff is a Jones Act seaman.

We submit to the Court that there is truly a *possibility* that a maritime worker such as David Cunningham who spends 75 percent of his time on vessels doing the work of the vessel and contributing to its function and its mission and who suffers injury on the vessel while doing that work can *possibly* prove seaman status to the finder of fact. That is the test which the Court must look to, i.e. *possibility,* not probability.

We respectfully urge the Court to grant this Petition for Writ of Certiorari and then reverse the Court of Appeals' and the District court's rulings in which they denied petitioner's Motion to Remand and granted respondent's Summary Judgment. This Jones Act suit should be remanded to the Court of Appeals and to the District Court with instructions that the entire case in turn be remanded to the Thirty-Eighth Judicial District Court, Parish of Cameron, Louisiana where it began and where it has always belonged.

Respectfully submitted,

GLENN W. ALEXANDER
*Counsel of Record*
JONES & ALEXANDER
Post Office Box 250
Cameron, Louisiana 70631
Telephone: 318/775-8121

*Attorney for Petitioner,*
*David Cunningham*

**APPENDIX 1**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 96-31166
Summary Calendar

---

DAVID CUNNINGHAM,

Plaintiff-Appellant,

versus

SCHLUMBERGER WELL SERVICES, ET AL.

Defendants.

SCHLUMBERGER WELL SERVICES, also known as Schlumberger Technology Corp.

Defendant-Appellee.

---

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 96-CV-1577

---

(Filed May 27, 1997)

Before DAVIS, EMILIO GARZA and STEWART, Circuit Judges.

PER CURIAM:*

David Cunningham argues that the district court erred in denying his motion to remand in his Jones Act action. The district court held that Cunningham could not possibly establish seaman status. Cunningham also appeals the granting of summary judgment in favor of Schlumberger Well Services.** Schlumberger argued that it was entitled to summary judgment given the district court's ruling on the motion to remand that Cunningham could not establish seaman status.

We have reviewed the record and the briefs on appeal and AFFIRM the district court's orders denying the motion to remand and granting the motion for summary judgment in favor of Schlumberger Well Services for essentially the same reasons set forth by the district court. *Cunningham v. Schlumberger Well Serv., a Div. of Schlumberger Tech. Corp.; Diamond Offshore (USA), Inc., Diamond Offshore Drilling Serv., Inc.; Hardy Oil & Gas USA, Inc.; Haliburton Co.; James E. Guidry; Tony Vovers; and Mike Adams,* No. 96-31166 (W.D. La. Sept. 27 1996; Oct. 11, 1996).

AFFIRMED

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

** Also dismissed on the motion for summary judgment were Tony Vovers and Mike Adam, incorrectly identified as Mike Adams. Cunningham did not appeal the dismissal of these claims. They are therefore waived on appeal. *Cinel v. Connick,* 15 F.3d 1338, 1345 (5th Cir.), *cert. denied,* 513 U.S. 868 (1994).

**APPENDIX 2**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

| | | |
|---|---|---|
| DAVID CUNNINGHAM | : | CIVIL ACTION |
| VERSUS | : | NUMBER 96-1577 |
| SCHLUMBERGER WELL SERVICES, A DIVISION OF SCHLUMBERGER TECHNOLOGY CORP., ET AL. | : | JUDGE HUNTER |

MEMORANDUM RULING

(Filed Sep. 26, 1996)

Before the Court is plaintiff's motion to remand to state court on the grounds that plaintiff's Jones Act allegation prohibits removal. There exists complete diversity of citizenship among all corporate defendants,[1] as well as independent federal jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"). The underlying inquiry is: Could reasonable persons, applying the proper legal standard, decide that plaintiff was a Jones Act seaman? The Supreme Court of the United States, ***Chandris v. Latsis,*** 115 S.Ct. 2172 (1995) recently defined the prerequisites for Jones Act status.

---

[1] The Louisiana citizenship of the three individuals joined as defendants are disregarded for diversity purposes inasmuch as the declarations and deposition excerpts reveal that there is no possibility that plaintiff can establish a cause of action against the individual defendants.

Plaintiff has filed an affidavit which describes the nature of his work, the mission of the vessels upon which he worked and his interpretation of the work history data. We quote from that affidavit:

> "My name is David Cunningham. I have been directly involved and associated with offshore oil and gas exploration for almost 17 years. My specialty, among others, is production testing. At the time of my accident which resulted in the loss of my leg, I was assigned to the M/V OCEAN AMBASSADOR. This vessel is what's known as a semi-submersible drill ship. Its sole mission and purpose is to drill, test and complete oil and gas wells in deep water. A typical voyage for this vessel would be as follows: First, the vessel would be towed to a particular location in the Gulf. The anchor handlers would set various anchors which would maintain the vessel in its location to accomplish its purpose. From this point forward during the entire project or voyage, various groups of skills or specialties are onboard at various times. First, the owner of the lease (the oil company who has chartered this vessel) will have its supervisors there for overall supervision. Secondly, the ship owner will have a group of employees who are typically those that operate the drilling equipment and support activities aboard the vessel, i.e. tool pusher, driller, rough neck, roustabout, welder, crane operator, etc. These employees of the shipowner are assigned bunks, fire stations, eat and live aboard the ship during their hitch (which can typically be 7 on 7 off, 14 on 14 off or some variation of that). Another group is aboard the vessel to provide the mean service and housekeeping. These are typically employees of

a catering company and not employees of the shipowner. They usually work an off/on schedule similar to that of the employees of the shipowner. The next group of people who work aboard the ship in connection with its mission are specialty people who are typically hired by the lease owner to come aboard the ship, either continuously during the operation or at various intervals. Typically, in this group are people who do cementing, logging, mud, pressure testers, and those who test the well. Without this group, the vessel could not accomplish its mission. In the planning stage of the project, these various services are secured and assigned to the project. My work fell in this category. The client, the oil company, would engage Schlumberger, my employer, to perform testing of a well. We may also be assigned to do other specialities including logging, perforating, etc. I was proficient in a number of skills. Once we were assigned to this project, my time in the Houma office would be spent becoming familiar with the work to be done, assembling and testing the tools and equipment to do the job. Sometimes, I would make a pre-job inspection aboard the ship in preparation for the arrival of the equipment. When the drilling operation reached the stage where my assigned specialty was needed, I went aboard the ship and remained there until my part of the drilling operation, i.e. usually testing, was complete. My involvement in the project would not end when I left the ship as it was necessary that I return the equipment to our yard, disassemble and make the necessary reports to close out my part of the project.

The duration of my physical stay aboard the ship would vary depending upon the specialty,

the weather, and problems which may be encountered. During my physical stay on the ship, I was assigned a bunk along with other specialties and along with the other employees of the ship owners. I ate aboard the ship with all of these people, was required to follow the ships safety rules and was assigned a specific fire station. During my work aboard the ship, I would use the equipment and tools brought aboard by me and would be assigned in my work by the employees of the ship owner. During the testing operation, this would be the primary operation taking place aboard the ship. Most non-essential tasks were interrupted during the testing. While the tool pusher was still in overall charge of the ship and while the company representative was in overall charge of the drilling operation, my crew ran the testing operation.

During the taking of my deposition, I was unable to recall details of my work during certain years. Since that time, I have been furnished with copies of the Schlumberger service orders which described the work. These service orders show that since 1992, approximately 75% of my work involved an assignment of a project aboard a jack up vessel, barge jobs or a semi-submersible job. I interpret these service orders to cover 71 projects, 39 of which were offshore on drill ships, 20 which were on either offshore or onshore drilling barges and 12 of which were either on stationary platforms or land.

At the time of my accident, I was assigned to the OCEAN AMBASSADOR and was actively pursuing the ship's work testing the well."

Documents in the record reveal that plaintiff worked randomly for many different customers on many different drilling vessels owned by many different customers. This was his first occasion to have ever been aboard the OCEAN AMBASSADOR, and his work on that rig would not have exceeded three (3) weeks. The Supreme Court of the United States granted certiorari, 115 S.Ct. 354 (1994) to resolve the continuing conflict among the Courts of Appeal regarding the appropriate requirements for seaman status under the Jones Act. On June 14, 1995, the Supreme Court rendered its judgment ***Chandris, Inc. v. Latsis,*** 115 S.Ct. 2172. There, the Court stated:

> "Employment-related connection to a vessel in navigation" necessary to qualify as a seaman under the Jones Act, *Id.*, at 355, 111 S. Ct., at 817, comprises two basic elements: the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature."

On the uncontested facts, there simply is no way that plaintiff can establish Jones Act criteria as articulated by the Supreme Court in ***Chandris***, 115 S.Ct. 2172, 2195 (1995):

> "the workers' duties must have a connection to a vessel in navigation (or to an identifiable group of vessels) that is substantial in terms of both it's duration and it's nature."[2]

---

[2] We note Judge Stevens' opinion, with whom Justices Thomas and Breyer concurred, to the effect that "an employee of

Mr. Cunningham's six year employment with Schlumberger, and seven days aboard the OCEAN AMBASSADOR do not equate with the possibility that he had a connection that was substantial in terms of both its duration and nature. Fifth Circuit cases involving Schlumberger personnel are in accord with this conclusion. ***Langston v. Schlumberger Offshore Services, Inc.,*** 809 F.2d 1192 (1987). There, plaintiff worked on various jobs offshore for approximately one year before the accident. During that time, he was assigned to eighteen jobs on fifteen different vessels owned by ten different owners. *Id.* at 1193-94. Based upon those facts, the Fifth Circuit found that the "group of vessels Langston worked aboard simply [did] not qualify as a fleet. Id. at 1194.

Similarly, in ***Ardleigh v. Schlumberger Ltd.,*** 832 F.2d 933 (5th Cir. 1987), the plaintiff, a Schlumberger engineer, worked on thirty different drilling vessels over his two year employment. His vessel work accounted for nearly 70% of his offshore time. *Id.* at 934. Rejecting the Jones Act claim on summary judgment, the Court noted the well established rule that "itinerant" oilfield workers such as Ardleigh are not Jones Act seaman. "Although such workers may spend a significant amount of time on

---

a ship who is injured at sea in the course of his employment is always a seaman." This view, if shared by the majority, would certainly simplify the difficulty of defining who is a "seaman". But, the majority, in rejecting Justice Stevens' view, noted that "the Jones Act was intended to protect sea based maritime workers who owe their allegiance to a vessel, and not land based employees who do not." ***Chandris, supra,*** 2194.

seagoing vessels, they usually have no permanent relationship with a particular vessel or fleet of vessels." *Id.* 934.

Cunningham cannot possibly meet the seaman status criteria. He did not have a connection to a vessel in navigation (or an identifiable group of vessels) that was substantial in terms of both its duration and nature. Like the plaintiffs in ***Langston,*** (18 jobs, 15 vessels, 10 owners) and ***Ardleigh,*** (40 jobs, 30 vessels, lacking common ownership) and ***Lirette,*** 831 F.2d 554 (5th Cir. 1987) (4 years, 23 vessels lacking common ownership), the group of vessels that Cunningham worked aboard simply did not qualify as a fleet.

The Motion to Remand is DENIED.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this 26th day of September, 1996.

/s/ Edwin F. Hunter Jr.
EDWIN F. HUNTER, JR.
UNITED STATES
DISTRICT JUDGE
SENIOR STATUS

**APPENDIX 3**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

| | | |
|---|---|---|
| DAVID CUNNINGHAM | : | CIVIL ACTION |
| VERSUS | : | NUMBER 96-1577 |
| SCHLUMBERGER WELL SERVICES, A DIVISION OF SCHLUMBERGER TECHNOLOGY CORP., ET AL. | : | JUDGE HUNTER |

ORDER

(Filed Sep. 26, 1996)

Plaintiff's Motion to Remand this matter to state court is DENIED.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this 26th day of September, 1996.

/s/ E.F.H. Jr.
EDWIN F. HUNTER, JR.
UNITED STATES
DISTRICT JUDGE
SENIOR STATUS

**APPENDIX 4**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

| | | |
|---|---|---|
| DAVID CUNNINGHAM | : | CIVIL ACTION |
| VERSUS | : | NUMBER 96-1577 |
| SCHLUMBERGER WELL SERVICES A DIVISION OF SCHLUMBERGER TECHNOLOGY CORP., ET AL. | : | JUDGE HUNTER MAGISTRATE JUDGE WILSON |

MEMORANDUM RULING

(Filed Oct. 10, 1996)

Before the court is a motion for summary judgment (doc. # 23) filed on behalf of: Schlumberger Well Services, a Division of Schlumberger Technology Corp. ("Schlumberger"), Charles M. Adam (incorrectly identified in plaintiff's petition as "Mike Adams"), and Tony Vovers.

In our September 26, 1996, Memorandum Ruling, this court held that plaintiff could not possibly satisfy the criteria for seaman status under the Jones Act. Moreover, as plaintiff's employer, Schlumberger is immune from negligence claims asserted under general maritime law. 33 U.S.C. § 905(a) and/or La. R.S. 23:1032.

Also in the September 26, Ruling, we found that the uncontroverted evidence established that individual defendants, Charles M. Adam and Tony Vovers, were in

no way connected to plaintiff's accident; and consequently, there existed no possibility that plaintiff could establish a cause of action against these defendants.

As noted by the Fifth Circuit, "Summary judgment will always be appropriate in favor of a defendant against whom there is no possibility of recovery," ***Carriere v. Sears, Roebuck & Co.***, 893 F.2d 98, 102 (5th Cir.1990). Accordingly, for the reasons assigned in our September 26, Ruling, together with the Fifth Circuit's pronouncement in ***Carriere, supra,*** summary judgment is hereby GRANTED in favor of defendants, Schlumberger Well Services, a Division of Schlumberger Technology Corp.; Charles M. Adam (incorrectly identified in plaintiff's petition as "Mike Adams"); and Tony Vovers, dismissing plaintiff's claims in their entirety against said defendants only.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this 10th day of October, 1996.

/s/ Edwin F. Hunter, Jr.
EDWIN F. HUNTER, JR.
UNITED STATES
DISTRICT JUDGE
SENIOR STATUS

**APPENDIX 5**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

| | | |
|---|---|---|
| DAVID CUNNINGHAM | : | CIVIL ACTION |
| VERSUS | : | NUMBER 96-1577 |
| SCHLUMBERGER WELL SERVICES A DIVISION OF SCHLUMBERGER TECHNOLOGY CORP., ET AL. | : | JUDGE HUNTER MAGISTRATE JUDGE WILSON |

JUDGMENT

(Filed Oct. 10, 1996)

In accordance with today's memorandum ruling and this court's September 26, 1996. Memorandum Ruling and Order, and upon an express determination that there is no just reason for delay, it is expressly directed that final judgment pursuant to Fed.R.Civ.P. 54(b) be, and it is hereby entered in favor of defendants, Schlumberger Well Services, a Division of Schlumberger Technology Corp.; Charles M. Adam (incorrectly identified in plaintiff's petition as "Mike Adams"); and Tony Vovers and against plaintiff, David Cunningham, dismissing, with prejudice, plaintiff's claims in their entirety against said defendants only. Plaintiff's claims against the remaining defendants are preserved.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana on this 10th day of October, 1996.

/s/ Edwin F. Hunter, Jr.
EDWIN F. HUNTER, JR.
UNITED STATES
DISTRICT JUDGE
SENIOR STATUS

Supreme Court, U.S.
FILED
SEP 17 1997
CLERK

No. 97-312

In The

# Supreme Court of the United States

October Term, 1996

DAVID CUNNINGHAM,

*Petitioner,*

*vs.*

SCHLUMBERGER WELL SERVICES, A DIVISION OF SCHLUMBERGER TECHNOLOGY CORPORATION,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL P. HANTEL
SCHLUMBERGER LTD.
105 Industrial Boulevard
Sugarland, TX 77478
(713) 274-7650

DAVID W. LEEFE
*Counsel of Record*
GEORGE H. ROBINSON, JR.
DAVID L. REISMAN
LISKOW & LEWIS
One Shell Square
701 Poydras Street, Suite 5000
New Orleans, LA 70139-5099
(504) 581-7979

*Attorneys for Respondent*

72016 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

13 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts properly held that a Jones Act claim asserted by an individual who could not possibly meet the criteria for seaman status was fraudulently joined for the purpose of defeating removal jurisdiction.

2. Whether, as implied by the petitioner, this Court erroneously ruled in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S. Ct. 2172 (1995), and *Harbor Tug and Barge Co. v. Papai*, __ U.S. __, 117 S. Ct. 1535 (1997), that a seaman must have a substantial connection to a vessel or identifiable group of vessels and that an "identifiable group of vessels" is one under common ownership or control.

## PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The parent corporation of respondent, Schlumberger Well Services, a Division of Schlumberger Technology Corporation, is Schlumberger Limited.

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## STATEMENT OF THE CASE

### A. Procedural History

David Cunningham filed suit against Schlumberger Well Services, A Division of Schlumberger Technology Corp. ("Schlumberger") and others on May 29, 1996 in the 38th Judicial District Court for the Parish of Cameron, State of Louisiana. Cunningham, a Schlumberger employee, asserted a claim against Schlumberger and fellow Schlumberger employees Tony Vovers and Charles Adam pursuant to the Jones Act, 46 U.S.C. § 688, *et seq.* On July 2, 1996, Schlumberger and the other defendants timely removed the case to the United States District Court for the Western District of Louisiana, Lake Charles Division. Removal was premised on the existence of diversity jurisdiction and federal question jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349. The defendants asserted that the non-diverse individual defendants were fraudulently joined for the purpose of destroying diversity and that plaintiff's Jones Act claim was fraudulently joined for the purpose of preventing removal.

On July 29, 1996, Cunningham filed a motion to remand the case to state court. Conceding that the individual defendants had been fraudulently joined, Cunningham argued only that there was a possibility that he could meet the criteria for seaman status under the Jones Act and that removal was therefore improper. Schlumberger opposed the motion to remand. In a memorandum ruling dated September 26, 1996, the district court, applying the clear precedent set by this Court, concluded that Cunningham's Jones Act claim and the claims against the individual defendants had been fraudulently joined. Accordingly, the district court denied Cunningham's motion to remand.

On October 4, 1996, Schlumberger, along with defendants Tony Vovers and Charles Adam, filed a motion for summary judgment and entry of Rule 54(b) final judgment. The motion for summary judgment sought the dismissal of Cunningham's Jones Act claims against Schlumberger, Vovers, and Adam. Citing its earlier ruling wherein Cunningham was determined not to be a seaman, the district court granted the motion for summary judgment and dismissed Cunningham's Jones Act claims on October 10, 1996. On the same day, the district court issued a judgment certifying its ruling on motion for summary judgment as final under Federal Rule of Civil Procedure 54(b).

Cunningham appealed the rulings on both the motion to remand and motion for summary judgment in favor of Schlumberger to the United States Court of Appeals for the Fifth Circuit on November 6, 1996. Once again, Schlumberger opposed the appeal. On May 27, 1997, the Fifth Circuit issued a *per curiam* opinion affirming the district court's rulings.

**B. Statement of Uncontradicted Facts**

At the time of the accident made the subject of this lawsuit, plaintiff, David Cunningham, was employed by Schlumberger as a Field Technician. Schlumberger is an oilfield company engaged in a wide variety of activities related to the exploration and production of oil and gas, including wireline, testing and completion services. Schlumberger is typically hired by an oil company to perform well-related services on a drilling rig or well site. Schlumberger employees are not assigned to a particular customer or drilling rig, but instead rotate from job to job and rig to rig as the need arises.

Cunningham began his employment with Schlumberger in May 1989. His work schedule was typical of other Schlumberger employees performing oilfield work. He worked on various types

of drilling rigs, including land, platform, barge, jack-up, and semi-submersible. He was never assigned to work exclusively on any one rig nor any group or fleet of rigs under common ownership or control. His work assignments were on a random basis, depending on the type of work requested by Schlumberger's customer, and the availability of other Schlumberger personnel.

At the time of his accident, Cunningham was performing production testing services on the drilling rig OCEAN AMBASSADOR for Schlumberger's customer, Hardy Oil & Gas. The OCEAN AMBASSADOR, a drilling vessel, was owned by Diamond Offshore and chartered to Hardy Oil & Gas. Cunningham arrived on the rig on Monday, January 15, 1996. While working on Saturday, January 21, a pressurized pipe parted and injured Cunningham's leg. Had the accident not occurred, Cunningham would have likely completed the job and left the rig on or about January 24 or 25. This was Cunningham's first job for Hardy Oil & Gas, and his first time ever on board the OCEAN AMBASSADOR.

## REASONS FOR DENYING THE WRIT

### I.

### THE LOWER COURTS APPLIED THE PROPER STANDARD FOR FRAUDULENT JOINDER.

Cunningham begins his attack on the lower courts' rulings by suggesting that the doctrine of fraudulent joinder may be used to disregard a claim for purposes of removal jurisdiction only upon a showing of the plaintiff's actual fraud or bad faith. Cunningham contends that it was error for the lower courts to conclude that his Jones Act claim was fraudulently joined solely on the basis that he could not possibly meet the criteria for

seaman status. This assertion is contrary to the law established by this Court and to the circuit courts' uniform application of the fraudulent joinder doctrine, and it does not warrant consideration here.

As an initial matter, it should be noted that Cunningham failed to raise this issue before the district court or the court of appeals. Instead, Cunningham confined his lower court argument to the contention that he could possibly meet the criteria for seaman status. It is a matter of well settled law, however, that an issue may not be raised for the first time on appeal. *United States v. Ortiz*, 422 U.S. 891, 898, 95 S. Ct. 2585, 2589 (1975) ("We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari."). Consequently, Cunningham has waived his right to raise this issue.

Regardless of whether the issue has been waived, Cunningham's contention is without merit. Contrary to Cunningham's assertion, the circuit courts did not have to expand on this Court's pronouncement in *Great Northern Ry. v. Alexander*, 246 U.S. 276, 38 S. Ct. 237 (1918), to reach the logical conclusion that a claim with no possibility of success has been fraudulently joined. Instead, the circuit courts reached this conclusion by following well-settled Supreme Court authority. In *Chicago, R. I. & P. R. Co. v. Schwyhart*, 227 U.S. 184, 33 S. Ct. 250, 251 (1913), for example, this Court explained that in deciding whether a claim has been fraudulently joined for purposes of defeating removal, "we have not to consider more than whether there was a real intention to get a . . . judgment, and whether there was a colorable ground for it. . . ." Similarly, in *Chicago, R. I. & P. R. Co. v. Whiteaker*, 239 U.S. 421, 36 S. Ct. 152, 153 (1915), this Court held that a claim has been fraudulently joined if it was made "without any reasonable basis." *See also Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146, 34 S. Ct. 278, 280 (1914).

Applying these standards, the circuit courts have consistently concluded that evidence of actual fraud or bad faith is not necessary to establish fraudulent joinder. While Cunningham acknowledged opinions of the Fifth and Eighth Circuits following this rule, he failed to note similar opinions emanating from the Third Circuit, *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108 (3d Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991), Fourth Circuit, *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232-33 (4th Cir. 1993), Sixth Circuit, *Alexander v. Electronic Data Sys., Corp.*, 13 F.3d 940, 949 (6th Cir. 1994), Seventh Circuit, *Poulos v. Naas Foods Inc.*, 959 F.2d 69, 73 (7th Cir. 1992), and Eleventh Circuit, *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996). Significantly, Cunningham was unable to cite a single circuit court opinion which supports his contention that actual fraud or bad faith must be shown for a finding of fraudulent joinder.

Finally, application of Cunningham's theory of fraudulent joinder would lead to an absurd and untenable result. Under Cunningham's theory, a plaintiff with an incompetent attorney unaware of the prevailing law could defeat removal by pleading a baseless claim, while the same plaintiff, with the same baseless claim, but with a more enlightened lawyer, would be unable to defeat removal due to his attorney's bad faith in filing the claim. Removal should not, and indeed does not, depend on the relative knowledge of a plaintiff's attorney. Instead, removal, in the context of fraudulent joinder, depends on whether the plaintiff can possibly establish the cause of action.

In light of this Court's edicts, the consensus among the circuit courts, and the absurd result which would flow from a contrary holding, there is simply no reason to consider Cunningham's theory on fraudulent joinder.

## II.

## CUNNINGHAM CANNOT POSSIBLY SATISFY THE CRITERIA FOR SEAMAN STATUS.

On the basis of uncontradicted facts concerning Cunningham's work history, the lower courts concluded that Cunningham could not possibly satisfy the required Jones Act criteria in that he did not have a connection to a vessel or identifiable group of vessels that was substantial in terms of duration and nature. Considering this Court's latest seaman status pronouncements in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S. Ct. 2172 (1995), and *Harbor Tug and Barge Co. v. Papai*, __ U.S. __, 117 S. Ct. 1535 (1997), the lower courts here were entirely correct, and there is no just reason to disturb or review the decisions below.

Cunningham argues that he can possibly satisfy the criteria for seaman status despite the absence of a substantial connection to a vessel or identifiable group of vessels. This argument is, at best, disingenuous, for this Court recently reaffirmed that a seaman must have a connection to a vessel or identifiable group of vessels, *Chandris*, 515 U.S. at 368, 115 S. Ct. at 2179, and that an identifiable group of vessels is one under common ownership or control, *Papai*, __ U.S. at __, 117 S. Ct. at 1541-42. That Cunningham spent the majority of his time working aboard vessels is of no consequence, as Cunningham does not contend that those vessels were under common ownership or control. Interestingly, Cunningham chose not to cite the *Papai* decision in his Petition for Writ of Certiorari ("Petition"), despite having relied extensively on the Ninth Circuit's reversed opinion in his briefs to the lower courts. Regardless, this Court's decisions in *Chandris* and *Papai* are dispositive, and Cunningham has suggested no justifiable basis for this Court to revisit the issue.

## CONCLUSION

Cunningham has provided this Court with no basis for granting certiorari. Cunningham's Petition fails to present either a mistake of fact or a legal issue not previously addressed by this Court. The relief sought would require this Court to abandon its own recent precedent and rewrite the law to suit the petitioner's purpose. Accordingly, Cunningham's Petition should be denied.

Respectfully submitted,

DAVID W. LEEFE
*Counsel of Record*
GEORGE H. ROBINSON, JR.
DAVID L. REISMAN
LISKOW & LEWIS
One Shell Square
701 Poydras Street, Suite 5000
New Orleans, LA 70139-5099
(504) 581-7979

MICHAEL P. HANTEL
SCHLUMBERGER LTD.
105 Industrial Boulevard
Sugarland, TX 77478
(713) 274-7650

*Attorneys for Respondent*